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Supreme Court, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE, PETITIONER

V.

CARL AND YOLANDA DEATON

**On Petition For A Writ of Certiorari To The Court of Appeals of Texas Second District**

# PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO THE STATE OF TEXAS

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## PETITIONER'S SUPPLEMENTAL BRIEF

The State asks this Court to apply error-preservation rules to deny review of Ms. Rhine's due process challenge to application of error-preservation rules. The State's argument demonstrates that whether traditional error-preservation standards must sometimes be relaxed to ensure compliance with the Due Process Clause of the Fourteenth Amendment is a mature and fully developed issue with far-reaching implications.

Ms. Rhine contends that the *cumulative* denial of safeguards—not any one of them in isolation—denied her due process. In response, the State deftly severs Ms. Rhine's cumulative argument into its individual components, then dispatches each component piece-meal by terming it "fact-bound" and contending it does not alone constitute a denial of due process. This recasting of Ms. Rhine's argument, while undoubtedly clever and perhaps strategically sound, essentially ignores Ms. Rhine's actual due process claim.

### A. Review Of Ms. Rhine's Claims Is Appropriate Despite Her Failure To Press Them Explicitly In State Court.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court adjudicated Clarence Earl Gideon's federal constitutional claims even though he pressed them in the state trial court with a single sentence claiming that "the United States Supreme Court says I am entitled to be represented by counsel" and in his state-court habeas corpus petition with a cursory claim that Florida had deprived him of "rights guaranteed by the Constitution and the Bill

of Rights by the United States Government." *Ibid* at 337.

Ms. Rhine made similar statements in state court, arguing that termination proceedings must meet the "requisites of the due process clause of the Fourteenth Amendment" and be administered "consistent with the due process clause of the Fourteenth Amendment" (Indigency Hearing at 10-11). Like Gideon, Ms. Rhine did not squarely press her constitutional arguments in state court. But also like Gideon, she said enough for the state courts to know those federal constitutional claims were afoot.

Ms. Rhine's case—like Gideon's and others—justifies relaxing this Court's customary insistence that federal claims be squarely pressed or passed upon in state court. Rather than focusing on whether that insistence is jurisdictional or prudential,[1] the real question is whether it should be applied to Ms. Rhine either way. After all, this Court finds exceptions even to entrenched jurisdictional requirements like the final-judgment rule. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 484-86 (1975).

Ms. Rhine's inability to press her constitutional claims relates directly to the very denial of due process she how urges. The State's reading of Section 1257(a) places impecunious litigants like Ms. Rhine in a constitutional Catch-22: the State denies them due process, that due process denial prevents them from pressing their due

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[1] That question is "unsettled." *Howell* v. *Mississippi*, 543 U.S. 440, 445-46 (2005) (citing *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988)). Some recent decisions appear to treat the doctrine as prudential. *See, e.g., Illinois* v. *Gates*, 462 U.S. 213, 222 (1983).

process claim in state court, and they are then denied federal review of the due process violation based on their failure to press it in state court.

This Court recognized the folly of this constitutional conundrum in *Wood* v. *Georgia*, 450 U.S. 261 (1981). In *Wood*, petitioners were sentenced to probation conditioned on payment of fines. Petitioners failed to pay and the trial court revoked their probation. The state appellate court affirmed the revocations and petitioners sought review by this Court. Petitioners based their state-court appeal and petition for certiorari on equal protection grounds. *Ibid* at 262. But this Court identified a potential conflict of interest involving petitioners' counsel substantial enough to implicate due process and right-to-counsel concerns. This Court vacated petitioners' convictions and remanded the case with instructions that the state court determine whether the conflict of interest existed at the time of the revocation hearing and, if so, conduct a new hearing. *Ibid* at 273-74.

Because the *Wood* petitioners never raised any due process issue, Justice White argued that this Court lacked jurisdiction. *Ibid* at 277-79 (White, J., dissenting). The majority rejected that argument because the lawyer "who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused" and was unlikely to "concede that he had continued improperly to act as counsel." *Ibid* at 265 & n.5. In other words, the due process deficiency itself was responsible for petitioners' failure to press it in state court—just as with Ms. Rhine.

The State contends *Wood* differs factually from this case because the due process challenge in

*Wood* was "based on a defect in state proceedings that *affirmatively prevented* the parties from pressing the claim," namely their own lawyer's conflict of interest (State's Brief at 13 n.3). This purported distinction is vital to the State's argument that Ms. Rhine could have pressed her constitutional claims because "unrepresented litigants are fully capable of preserving their constitutional rights during trial and on appeal" (State's Brief at 13). But nothing prevented the *Wood* petitioners from raising their due process arguments—nothing, that is, but their lack of legal acumen or effective counsel. No state procedure stood in their way. This Court acknowledged as much by citing petitioners' lack of sophistication and resources in relaxing usual presentation requirement: "Petitioners were low-level employees, and now appear to be indigent . . . We cannot assume that they, on their own initiative, were capable of protecting their interests." *Ibid* at 265 & n.5.

Like the *Wood* petitioners, Ms. Rhine could—in theory—have pressed her claims; no state procedural rule barred her from doing so. But also like the *Wood* petitioners, nothing would lead this Court to adjudge Ms. Rhine—an indigent woman most recently employed as a fast-food worker—capable of protecting her constitutional interests.[2]

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[2] The State's other arguments are similarly unavailing. While *Wood* did not concern any challenge to a state statute, it challenged a state judicial decree, thus implicating the federalism concerns present in any federal review of state statutes or judicial pronouncements. And while *Wood* involved a second constitutional claim, this Court did not—contrary to the State's claim—base its exercise of jurisdiction on that claim. Indeed, the majority's discussion of jurisdiction does not even mention the other claim. *Wood*, 450 U.S. at 265 & n.5.

In exercising jurisdiction in *Wood*, this Court also deemed the due process issue raised in state court—even though petitioners never once mentioned it. Other parties pointed out the possible conflict of interest to the trial court, so that court knew of the factual foundation for what became the due process argument. Consequently, this Court found it "appropriate to treat the due process issue as one 'raised' below, and proceed to consider it . . . ." *Ibid* at 265 & n.5. Similarly, Ms. Rhine informed the trial and appellate courts of the factual foundation for her claims, namely her lack of counsel and even surpassed the *Wood* petitioners by mentioning the Due Process Clause.

Nothing in the policies underlying the presentation requirement justifies its application in this case. Contrary to the State's claim, Texas courts were not *deprived* of the first opportunity to consider the Texas statutes in light of Ms. Rhine's challenge. The Texas Supreme Court had that opportunity and *chose* not to exercise it—with full knowledge of Ms. Rhine's federal claims. Rejection of discretionary review may not satisfy the presentation requirement, but it is surely apposite in evaluating the policy reasons underlying that requirement. Ms. Rhine beseeched the Texas Supreme Court to hear her claims; it declined to do so. Its highest court having declined the opportunity to consider Ms. Rhine's claims, the State cannot now complain on policy grounds of its judiciary lacking the chance to exercise its role in our federal system.

Likewise, no practical considerations weigh against granting Ms. Rhine's petition. The State contends a better-developed record might resolve a dispute over whether Ms. Rhine could have afforded

the record but chose not to pay for it, or was denied the record despite being indigent (State's Brief at 4, 12). But the trial court explained why it was making Ms. Rhine pay for the reporter's record:

> I'll waive all the cost because of your indigency, with the exception of the four hundred and five dollars which would be necessary to pay for the court record and basically to pay for the typing cost so that that court reporter is not out that money. I don't think it's fair for the court reporter to be out four hundred and five dollars for this appeal.

(Transcript at 13). The trial court was protecting the financial interests of its court reporter, and said so explicitly. The trial court's statement inherently invokes this Court's decision in *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996)—as the court of appeals realized.

The Deatons argue that because Ms. Rhine admitted having funds to pay for the record at some unspecified time during the fifteen months between the trial court's indigency order and June 16, 2008, that means she must have been able to afford the record before her brief in the court of appeals was due, almost a year earlier (Brief in Opposition at 5-6). There is no support for this claim in the record, which establishes the trial court denied Ms. Rhine a transcript to prevent the court reporter from working for free.

In granting Ms. Rhine's petition, this Court would be applying its practice in criminal cases of considering the requirement of state-court presentation fulfilled where a pro se petitioner

makes the general substance of the federal claim clear in state court. To require more of a "layman and pauper . . . would compound the injury caused by the original denial of counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 487 (1945). In *Pollard* v. *United States*, 352 U.S. 354 (1957), this Court permitted court-appointed counsel to present questions not raised in state court by the pro se petitioner, even though "[h]ad petitioner been represented by counsel in the courts below and upon his petition for certiorari, we might well have considered those questions neither preserved below nor raised in the petition." *Ibid* at 359.

Applying similar analysis to Ms. Rhine would neither sound a death knell for error preservation nor create a broad rule excusing pro se litigants from ordinary presentation requirements. Ms. Rhine's failure to press her claims resulted from the very due process violation she now urges, which only happens to relate to her lack of counsel. It is this link between the due process violation and the failure to press it—and not merely Ms. Rhine's pro se status—that justifies relaxation of the presentation requirement. The overwhelming majority of pro se litigants—few of whom complain of defects that go to the very heart of their failure to press the defect in state court—would remain subject to ordinary presentation and error-preservation requirements.

### B. Ms. Rhine's Due Process Claim Is Substantial And Has Far-Reaching Implications.

Ms. Rhine's contends the *cumulative effect* of denying her almost all safeguards normally associated with termination actions denied her due

process. The State's "sever-and-dispatch" strategy only underscores the seriousness of the cumulative violation.

Ms. Rhine did not receive a trial lawyer despite requesting one repeatedly. And this denial occurred without any *Lassiter* analysis. The State intimates the trial judge considered the *Lassiter* factors or their statutory equivalent (State's Brief at 19). But the trial court made clear it was declining to appoint counsel based not on the exercise of discretion (*Lassiter*-based or otherwise), but on its belief that it lacked such discretion: "Up until 2003, a judge did have the right to actually make a discretionary call as to whether or not an attorney would be appointed . . . but the law is clear that I can't appoint you an attorney" (Indigency Hearing at 11-12). The court explained that "this is not a case filed by a governmental entity and, therefore, there is no basis upon which to appoint an attorney . . . ." (*Ibid* at 13).

The State criticizes Ms. Rhine for failing to cite any applicable *Lassiter* factors in her petition (State's Brief at 18), but does not suggest how she might do so in the absence of a record. This failure simply reinforces Ms. Rhine's acute need for the trial transcript. After all, this Court's searching examination of the trial record in *Lassiter* itself establishes the trial transcript as the touchstone for appellate review concerning the absence of counsel. *See Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 22-24, 32-33 (1981).

Having been denied a court-appointed lawyer without benefit of the *Lassiter* analysis, Ms. Rhine then was adjudged indigent but did not receive a transcript in violation of this Court's decision in

*M.L.B.* The State blames this not on the trial court's apparent ignorance of *M.L.B.* or on the appellate court's refusal to act despite seeing a constitutional violation, but on Ms. Rhine for failing "to invoke her rights" (State's Brief at 17). But Ms. Rhine *did* invoke her rights. She filed an appeal, sought and established indigency, and requested a record. Here, again, the State's response establishes the propriety of review, this time to amplify and clarify whether any additional action was required of Ms. Rhine to "invoke" the due process right enunciated in *M.L.B.*

Texas courts then denied Ms. Rhine appellate review of her constitutional claims, apparently based on traditional error-preservation standards. The State's assertion of these same error-preservation standards as an adequate and independent state ground begs the question; it is the very application of these standards that is now at issue under the Due Process Clause.

Ms. Rhine's due process claims have far-reaching implications even in states that provide counsel to indigent parents in all termination actions. This case would decide whether the Due Process Clause may sometimes require that traditional error-preservation rules be relaxed in termination proceedings. Independently, the decision in this case would clarify both the actions necessary to trigger the *Lassiter* analysis and whether the right to a trial transcript under *M.L.B.* is complete upon establishment of indigency, filing of an appeal, and a request for the record.

Given the staggering number of children in foster care across this nation and the likelihood of ever-more termination actions, the questions presented by Ms. Rhine are substantial and likely to

recur in courtrooms across the country. As a result, review is appropriate—and desperately needed by indigent parents like Ms. Rhine, who find themselves facing the awesome power of our judicial system, but lacking too many of its vaunted procedural safeguards.

### C. The Texas Scheme Violates The Equal Protection Clause.

Ms. Rhine advances an as-applied equal protection challenge to the Texas statutes, which guarantee counsel to indigent parents only in State-initiated termination actions. The Texas statute burdens Ms. Rhine's attempt to exercise a fundamental right, meaning some level of heightened scrutiny is appropriate—just as it was in *M.L.B.* *See* *M.L.B.*, 519 U.S. at 120-21 (citing *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983)).

The Texas statutes vest trial courts with discretion to appoint attorneys in privately-initiated termination actions. But that discretion is far more limited than the State intimates and hardly co-extensive with the Due Process Clause or *Lassiter*. The trial court may appoint counsel only where necessary to determine the best interest of the child. TEX. FAM. CODE ANN. § 107.021 (Vernon 2002 & Supp. 2008). The statute does not permit appointment where the child's best interest may be determined without it—notwithstanding the parent's due process rights.[3]

The Texas scheme draws a distinction that is arbitrary on its face. Texas imposes additional

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[3] Even that guarantee may be illusory. The trial court made clear that even if it tried to appoint counsel, "the County would not pay for it" (Indigency Hearing at 12).

burdens on indigent parents like Ms. Rhine to obtain the same benefit automatically provided to indigent parents facing State-initiated termination actions. And Texas does this without even a rational basis for treating these similarly-situated citizens differently. The statute is akin to one providing counsel as-of-right to citizens above six feet tall, while making it discretionary for those under six feet tall; or, worse yet, a statute providing the State *must* provide counsel to men, but *may* provide it to women. Neither could survive equal protection analysis under *any* standard of review.

The State's claimed justification for the different treatment of similarly-situated citizens—that only citizens in State-initiated suits face the State's power—is belied by the reality of family law litigation. Even in privately-initiated termination actions, the State is an omnipresent force. In this case, the Deatons obtained standing through the State's action in seizing J.C. and placing her in State-sponsored foster care. Perhaps most critically, in attacking Ms. Rhine, the Deatons relied on evidence gathered by the State and apparently turned over to the Deatons.[4] Ms. Rhine confronted the power of the State at every turn. In any termination action the defending parent is faced with the awesome power of the State, rendering any distinction in treatment based on the filing party arbitrary on its face.

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[4] Ms. Deaton's affidavit in the clerk's record relies on evidence obtained by the Department (CR at 8-10) and the Deatons' petition included an affidavit from a Department employee and Department documents (CR at 15-19).

## CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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